



FILED

Jun 04 2008, 8:44 am

Kevin L. Smith

CLERK

of the supreme court,
court of appeals and
tax court

ATTORNEYS FOR APPELLEES:

SHAWNA MEYER EIKENBERRY
Baker & Daniels LLP
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

)
)
)
)
)
)
)
)
)

No. 49A02-0708-CV-654

Appellees-Plaintiffs.

June 4, 2008

BAILEY, Judge

Case Summary

Appellants Michael Glant and Eileen Glant (collectively, “the Glants”) appeal an order of the Marion Superior Court providing that they are liable for attorney’s fees attributable to deception in a real estate transaction with Thomas Bovis and Elizabeth Vogel-Bovis (collectively, “the Bovises”). We affirm the judgment of the trial court with respect to rescission and consequential damages, but reverse the award of attorney’s fees.

Issues

The Glants present six issues for review, which we consolidate and restate as the following issue: Whether there is sufficient evidence to establish that the Glants, acting with intent to defraud, misrepresented property as suitable for a building site, so as to establish a Deception claim under Indiana Code Section 35-43-5-3 and support the award of statutory attorney’s fees for a crime victim.¹

On cross-appeal, the Bovises raise two issues, which we consolidate and restate as the following issue: whether they are entitled to additional attorney’s fees and costs.

¹ Although the Glants frame several issues for review, they concede that the remedy of rescission may be appropriate (because of mutual mistake as opposed to fraud). As such, the Glants do not specifically contest two elements of the relief afforded by the trial court’s order: return of the purchase price and reimbursement of expenditures such as driveway paving. The Glants argue in relevant part: “Sellers do not dispute that they, much like Realtor/Buyer, assumed a soil test was completed as a part of the engineering plans. As is now evident, both parties were wrong. Accordingly, this Court may feel rescission is the proper remedy due to a mutual mistake of fact. However, such a conclusion does not warrant overreaching and baseless findings of fraud, deception or breach of an express warranty. Nor does such a conclusion contemplate the award of attorney’s fees.” Brief of Appellant at 28. Ultimately, the Glants oppose only the attorney’s fees portion of the damages award, which was dependent upon establishing statutory deception. The alternative bases for relief (common law fraud and breach of an express warranty) do not entitle the prevailing party to attorney’s fees. Accordingly, where the Glants only seek reversal of the statutory attorney’s fees available to a crime victim, we need not determine whether the Bovises also presented sufficient evidence to establish their alternative, common law claims in order to render advisory opinions thereon.

Facts and Procedural History

In November of 1990, the Glants purchased Lot 17 in the Traders Hollow subdivision in Marion County. In November of 1997, the Bovises offered to purchase the unimproved lot. During negotiations, the Bovises requested that the Glants provide a soil test sample from the lot. The Glants declined to provide a sample and, instead, gave the Bovises a copy of a septic plan they had obtained in 1993. The purchase was consummated without additional testing.

At some point after the purchase, the Bovises applied for and were denied a septic permit. It was determined that the lot's soil conditions and slope would not accommodate the size of septic system required by the subdivision's covenants and restrictions. The lot was too steep, and had overly compacted soil and inadequate topsoil.

In December of 1998, the Bovises filed their "Complaint for Fraud, Rescission, Respondeat Superior, and Breach of Warranty"² against the Glants, the Glants' realtor, Joseph J. Loukota, and F.C. Tucker Company, Inc., the developer of the subdivision, Traders Hollow Development, Ltd. and David Helm, an employee of Dayspring Development of Indiana, Inc., the General Partner of Traders Hollow. (App. 466.)

The Glants cross-claimed against Helm and Traders Hollow. The defendants/ cross-claim defendants other than the Glants were dismissed and a bifurcated trial commenced on November 29, 2005. On July 11, 2006, Judge Patrick McCarty entered Findings of Fact, Conclusions of Law, and Judgment finding that the Glants committed fraud, criminal

² The complaint did not assert a claim for statutory deception although the Bovises, in response to the Glants' motion for judgment on the evidence, argued that they had satisfied the burden of proof necessary to establish

deception, and breach of warranty. A hearing on damages was conducted on September 11, 2006. The matter of damages was taken under advisement.

Pursuant to Indiana Trial Rule 53.2, Special Judge David Shaheed was appointed on March 22, 2007. On July 6, 2007, Judge Shaheed entered an order on damages. The Glants were ordered to refund the Bovises the purchase price of \$65,620.00 plus prejudgment interest, and to reimburse the Bovises for expenses including homeowners association fees and driveway costs in the aggregate amount of \$11,964.51. Finally, the Glants were ordered to pay attorney's fees in the amount of \$65,750.80. This appeal ensued.

Discussion and Decision

I. A. Standard of Review

When, as here, the trial court finds the facts specially and states its conclusions thereon pursuant to Indiana Trial Rule 52, the court on appeal shall not set aside the findings or judgment unless clearly erroneous. State Farm Mut. Auto Ins. Co. v. Leybman, 777 N.E.2d 763, 765 (Ind. Ct. App. 2002), trans. denied. We review the judgment by determining, first, whether the evidence supports the findings and, second, whether the findings support the judgment. Evans v. Med. and Prof'l Collection Servs., Inc., 741 N.E.2d 795, 797 (Ind. Ct. App. 2001). We consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we neither reweigh the evidence nor assess witness credibility. Id. However, appellate courts owe no deference to trial court determinations deemed questions of law. GKN Co. v. Magness, 744 N.E.2d 397, 401 (Ind. 2001).

The Glants argue that no deference should be given to the findings in this case because, several months after trial, the trial court adopted the Bovises' proposed findings verbatim. Our Indiana Supreme Court has observed that the verbatim adoption of one party's proposed findings "weakens our confidence as an appellate court that the findings are the result of considered judgment by the trial court." Cook v. Whitsell-Sherman, 796 N.E.2d 271, 273 n.1 (Ind. 2003). However, while wholesale adoption is not encouraged, it is not prohibited. In re Marriage of Nickels, 834 N.E.2d 1091, 1096 (Ind. Ct. App. 2005). The critical inquiry is whether such findings, as adopted by the trial court, are clearly erroneous. Id.

I. B. Analysis – Deception Claim

The Glants do not directly challenge the remedy of rescission and its consequences, i.e., the return of the Bovises' purchase price and out-of-pocket expenditures. Rather, the arguments on appeal distill to a dispute over attorney's fees. The Bovises prevailed on their claim for civil remedies available to a crime victim. The Glants contend that the evidence did not establish that they committed statutory deception, so as to entitle the Bovises to attorney's fees.

The Bovises were awarded attorney's fees pursuant to the Indiana crime victim's relief act, Indiana Code Section 34-24-3-1(3),³ which provides:

³ In Indiana, litigants are generally obligated to pay their own attorney's fees in the absence of a statute, agreement, or stipulation authorizing such an award. Dempsey v. Carter, 797 N.E.2d 268, 274-75 (Ind. Ct. App. 2003), trans. denied.

If a person suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3, IC 35-42-3-4, or IC 35-45-9, the person may bring a civil action against the person who caused the loss for the following: . . .

(3) A reasonable attorney's fee.

The trial court found that the Glants committed deception by misrepresenting, with intent to defraud, the property's suitability as a building site, pursuant to Indiana Code Section 35-43-5-3(a)(6), which provides:

A person who with intent to defraud, misrepresents the identity of the person or another person or the identity or quality of property; commits deception, a Class A misdemeanor.

The Bovises had the burden of proving, by a preponderance of the evidence, that the Glants committed the crime of deception and that the Bovises suffered a pecuniary loss as a result. See Harco, Inc. of Indianapolis v. Plainfield Interstate Family Dining Assocs., 758 N.E.2d 931, 945 (Ind. Ct. App. 2001). Pursuant to Indiana Code Section 35-43-5-3(a)(6), they had to establish that the Glants (1) with intent to defraud (2) misrepresented (3) the quality of property. A criminal conviction is not a condition precedent to recovery in a civil action brought under the crime victim's relief act. Sam and Mac, Inc. v. Treat, 783 N.E.2d 760, 765 (Ind. Ct. App. 2003).

Initially, the Glants contend that they made no actionable misrepresentation. Two representations were at issue: the MLS advertisement and the tender of the septic site plans. According to the Glants, the MLS listing references to a "dream home" site to "accommodate many varied plans" are "puffery" and the provision of septic system plans do not equate to a representation that a sewer may be installed. Appellants' Brief at 11. They argue that they never met the Bovises prior to closing, and made their "representations" only within the

context of the written contract. They also deny that they had any intent to defraud the Bovises.⁴

The trial court's finding that a misrepresentation was made in the MLS listing has evidentiary support. Indeed, the Glants concede that Lot 17 is not a suitable building site as listed. On the other hand, the septic system plans do not purport to represent accurate conditions of Lot 17 in 1997, as they were compiled in 1993. At most, the plans made a "representation" of conditions that existed several years before the sale at issue. Even assuming, however, that representations amounting to "misrepresentations" were made, they cannot amount to statutory deception absent intent to defraud. The crux of a statutory deception claim is the intent to defraud.

The evidence most favorable to the judgment indicates that sometime between 1989 and 1991, excavation work was done on and near Lot 17, soil compaction occurred, and the lot was rendered unsuitable for building a home complying with homeowner association standards with a sewer. The Glants planned to build on their lot and expended thousands of dollars on designs before abruptly abandoning their plans shortly before construction was to commence. They had hired engineering experts, to whom it may have been apparent that the slope of the lot after excavation was too steep for the installation of an adequate septic. However, there is no evidence that the experts ever conveyed this conclusion to the Glants.

When the Bovises in their offer to purchase requested soil sample test results, the

⁴ Initially, the Glants argued that, assuming a representation was made, the Bovises had no right to rely upon a representation concerning sewer availability because the Addendum to the Purchase Agreement did not condition the sale on ability to install a sewer. However, in their Reply Brief, the Glants concede that Deception does not include an element of reliance. See Ind. Code § 35-43-5-3(a)(6).

Glants responded with a septic survey and drawings. Counter Offer #1 included the language: “Seller does not have sample of soil test but will provide purchaser with copy survey with septic information.” (App. 485.) At no time did the Glants advise the Bovises that they had obtained a soil test. There is no evidence that the Glants ever had soil test results in their possession.

There is no direct evidence that the Glants had knowledge of the non-feasibility of a septic for Lot 17. The Bovises have claimed that the Glants’ abrupt decision to abandon their building plans is indirect evidence of the same. The trial court found that the Glants’ explanations of their income fluctuations and projected cost over-runs were “pre-textual.” Nevertheless, the trial court did not expressly reject a corollary explanation offered by the Glants – that they found a suitable existing home.

As such, even if the Glants made technically false representations, there is a dearth of evidence that they knew the representations to be false.

Moreover, the Crime Victims Act contemplates an award of attorney’s fees only when the claimant has suffered pecuniary loss “as a result of” a violation of one of the enumerated statutes. See Ind. Code § 34-24-3-1(3). Accordingly, an alleged “crime victim” will not receive an award of attorney’s fees absent causation. Here, the Bovises (one of whom is a realtor), when confronted with the Glants’ statement that they lacked soil test results, elected to rely upon obsolete septic engineering plans. The Bovises’ failure to insist on current soil

tests, by merely checking an appropriate box on a pre-printed real estate form, is a contributing cause of their own injuries.

In light of the foregoing, we conclude that the trial court erroneously awarded attorney's fees to the Bovises under the Crime Victims Act.

II. Cross-Appeal

The Bovises seek additional attorney's fees and appellate attorney's fees. Consistent with our conclusion that the Glants are not properly liable for the Bovises' attorney's fees, we do not find that the Glants are liable for additional attorney's fees.

The order for rescission and consequential damages is affirmed; the order for attorney's fees is reversed.

Affirmed in part; reversed in part.

FRIEDLANDER, J., and KIRSCH, J., concur.